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PETITION FOR CERTIORARI.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

No. 288

ALF MILLER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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INDEX.

	Page
Petition for writ of certiorari	1–17
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	2
Trial	3
Evidence	3
Specification of errors to be urged	6
Reasons for granting the writ	7
Conclusion	17

CITATIONS.

Cases:	
Hall v. U. S., 150 U. S. 76, 37 L. Ed. 100, 14 S. Ct. 22	11
Homer Bird v. U. S., 180 U. S. 356, 45 L. Ed. 570, 21 S. Ct. 403	11
Michelson v. U. S., 335 U. S. 469	7, 9, 10, 14
Salt Lake City v. Smith et al., 104 Fed. Rep. 457 (Cir. Court of Appeals, 8th Cir., Oct. 15, 1900)	13
U. S. v. Modern Reed & Rattan Co., Inc., et al., 159 Fed. (2d) 656 (Circuit Court of Appeals, Second Circuit, Jan. 8, 1947)	13
Williams v. U. S., 168 U. S. 509	14
Miscellaneous:	
20 Am. Jur., Evidence, Sec. 325	11
28 U. S. C., Sec. 1254 (1)	2
Wigmore on Evidence, 3rd Ed., 1955 Supp., Sec. 18	13

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To the United States Court of Appeals for the Sixth Circuit.

Alf Miller prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on June 6, 1956.

OPINION BELOW.

The Court of Appeals incorporated its opinion in its order of June 6, 1956. A copy of same is annexed to the record.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 6, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED.

I. Did the District Court err in permitting the United States to offer in evidence, in its case in chief, testimony respecting the general character and reputation of the petitioner as one engaged in the illicit moonshine whiskey business?

II. Did the District Court err in permitting witnesses to testify, in behalf of the United States, respecting the petitioner's general reputation and character, as one engaged in the illicit moonshine whiskey business, when said witnesses were not qualified to testify respecting this?

III. Did the District Court err in instructing the jury respecting "substantial doubt"?

STATEMENT.

Petitioner was indicted with one J. B. Evans, in a seven-count indictment, which charged that on or about October 18, 1954, the petitioner had possession and custody of a distillery, carried on the business of a distiller without having bond; engaged in the carrying on of the business of a distiller with intent to defraud; worked in a distillery; made and fermented mash; possessed distilled spirits, and concealed distilled spirits, all in violation of the Internal Revenue Laws.

TRIAL.

The Petitioner entered his plea of not guilty and the cause came on for hearing on October 13, 1955, before the Court and a jury. Following the introduction of evidence, argument of counsel, and the charge of the Court as to the law, the jury returned a verdict of guilty as to the petitioner, and his co-defendant, J. B. Evans, on each of the seven counts (App. 4a-6a).

EVIDENCE.

Alf Miller, 48 years of age, resided in Cocke County, Tennessee, and engaged in the business of operating a restaurant, the White House Grill (App. 76a). Mr. Miller also owned a farm located near Newport, in Cocke County, Tennessee (App. 78a). This farm had been owned by Mr. Miller for approximately four years, and was used as a place for grazing stock. Mr. Miller testified: "Well, I had about thirty-one head of cows and calves, eight head of ponies, three sows and some pigs" on the farm (App. 79a). No other agricultural activities were engaged in upon the farm other than the raising of a small crop of tobacco by J. B. Evans, who had custody of the premises (App. 30a).

At the time the farm was acquired by Mr. Miller an electric pump was located on the premises, which sufficed to pump water from a creek, supplying the stock (App. 79a).

In February or March, 1954, J. B. Evans moved into a house on, and/or adjacent to the farm land, and agreed to care for Mr. Miller's cattle on the farm in consideration of being permitted to live in the farm house rent free (App. 80a).

From the time when Mr. Evans thus took custody of the premises until a raid made by representatives of the

Alcohol Tax Unit, on October 18, 1954, Mr. Miller visited his farm on infrequent occasions. Mr. Miller's trips to the farm were made with various individuals, interested in purchasing certain of the livestock (App. 80a-81a). On one of the visits to the farm did Mr. Miller ascertain that an illicit whiskey manufacturing operation was being conducted in certain of the buildings thereon (App. 81a-82a).

On October 18, 1954, certain representatives of the Alcohol Tax Unit, including one William N. Griffin, visited the premises owned by Alf Miller, and under the custody and control of J. B. Evans, and there located certain non-tax paid whiskey, and certain distilling apparatus, secreted in farm buildings upon the premises (App. 24a-30a).

During the cross-examination of the witness, Griffin, by counsel for Mr. Miller, he was asked the following questions, and gave the following answers:

> "Q. Alf Miller told you, and you know it to be true, that his business is running the White House Grill over on the road that leads from Newport down to Knoxville?
>
> A. I know he does run the White House Grill, yes, sir.
>
> Q. He spends about 14 hours a day working at the grill?
>
> A. I don't know.
>
> Q. You know that is one of the better eating places around Newport, has an A-1 rating?
>
> A. No, sir, I don't know that.
>
> Q. It is a nice, clean appearing place?
>
> A. Yes, sir, it is" (App. 42a).

The United States Attorney contended that the foregoing questions gave him carte blanche authority to place the general character and reputation of Mr. Miller in evidence, during the presentation of the case in chief, on behalf of the United States of America.

The District Attorney was allowed in certain instances, during the presentation of the government's case in chief, to present evidence respecting the general reputation and character of Mr. Miller, as a dealer in moonshine whiskey. On one occasion, when an objection was made by Mr. Miller to a question, which elicited such evidence, the Court sustained the objection. However, the District Attorney pressed for the answer, and received it. **The Court thereupon failed to instruct the jury to disregard this evidence.**

In concluding the case for the United States in chief, the United States Attorney announced dramatically, before the noon hour of adjournment, that, "**We have a witness on the way here from Knoxville that might wind it (the evidence) up for us**" (App. 65a). With the stage thus set, after the noon recess, the District Attorney was permitted to prove, by Mr. Roy Whaley, Chief United States Deputy Marshal, and former Sheriff of Sevier County, Tennessee, that on one occasion, while serving as Sheriff of Sevier County, some three or four people came to him and furnished him with a list of names of people allegedly engaging in the moonshine whiskey business. That on this occasion, "I heard of him (Mr. Miller) being implicated in moonshine whiskey" (App. 72a-73a).

After the United States was permitted to place Mr. Miller's alleged reputation as a moonshine whiskey dealer in evidence, in its case in chief, evidence was offered by Mr. Miller, in his defense, from responsible citizens of Cocke County, Tennessee, that he was a man of good character, and one having no reputation for such activities.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1) In holding that no reversible error was committed by the Trial Judge in ruling upon the admissibility of reputation evidence.

(2) In holding that no reversible error was committed by the Trial Judge in his charge to the jury wherein he defined substantial doubt, though the Sixth Circuit Court of Appeals expressed the thought that the Trial Judge should have omitted a portion of his charge.

It was error for the Court of Appeals to hold that there was no reversible error committed by the Trial Court in admitting testimony respecting the reputation of the petitioner as a dealer in moonshine whiskey, during the presentation of evidence by the United States, in its case in chief.

Further, it was error for the Court of Appeals to hold that there was no reversible error committed by the Trial Court, in permitting witnesses to testifying respecting the general character and reputation of the petitioner, as a dealer in moonshine whiskey, when said witnesses were not qualified to so testify.

Further, it was error for the Court of Appeals to hold that there was no reversible error committed by the Trial Court, in his charge to the jury, in defining "substantial doubt".

Further, it was error for the Court of Appeals to have affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

The decision of the Court below, in holding that character testimony was admissible, during the presentation by the United States, of its case in chief, is in direct conflict with the decision of this Court in **Michelson v. U. S., 335 U. S. 469.**

In addition, the District Court defined "substantial doubt" in such way as adversely affected the substantial rights of the petitioner.

During the presentation of its evidence in chief, the United States offered evidence respecting the reputation and character of petitioner, as a dealer in moonshine whiskey. This evidence was as follows:

> "Q. Mr. Griffin, something was undertaken to be brought out on cross-examination of you by Mr. Doughty about the reputation of the White House Grill, owned and operated by Mr. Alf Miller. What is the general reputation of that White House Grill as being a bootleg joint, or otherwise?
>
> Mr. Hurd: We object to that.
>
> The Court: Overruled. . . .
>
> Q. What was the reputation of the White House Grill, operated by Alf Miller, as being a bootleg place?
>
> A. It is a bootleg place" (57a).
>
> . . . . . .
>
> "Mr. Griffin, do you know the reputation of Alf Miller concerning moonshine whiskey?
>
> A. I do.
>
> Q. What is it?
>
> A. It is—his reputation as given to me by reports is that he is a dealer in moonshine whiskey" (59a).

Herman O. Bomar testified:

> "Q. **During your service as a federal officer, did you receive—and if so, when—information about the ac-**

tivities of the defendant Alf Miller with respect to moonshine whiskey?

Mr. Doughty: We object to that as an improper question and an improper way to prove reputation.

The Court: I sustain the objection.

By Mr. Meek:

Q. What is the reputation of Alf Miller with respect to moonshine whiskey?

By the Witness:

A. He is reputed to be one of the big men in the moonshine business in Cocke County" (67a).

Roy Whaley testified:

"Q. During your last term as sheriff of Sevier County, did you learn of the reputation of this defendant, Alf Miller, with respect to moonshine whiskey?

A. I heard of him being implicated in moonshine whiskey.

Q. More than once did you hear that?

A. Well, I don't recall but just one time some people talked to me about it.

Q. Some people? About how many talked to you?

A. There were two or three of them.

Mr. Doughty: We object to that as being hearsay.

The Court: That is not substantive evidence of the guilt or innocence of this man, Mr. Miller, but the jury may consider it as bearing upon his reputation only" (72a).

The United States District Attorney was permitted to ask Officer Griffin as to the "general reputation of that White House Grill as being a bootleg joint or otherwise" (App. 56a). Mr. Griffin testified: "It is a bootleg place" (App. 57a).

Mr. Griffin further testified: "It is his **(Mr. Miller's) Reputation as given to me by reports is that he is a dealer in moonshine whiskey**" (App. 59a).

Mr. Bomar testified, after the Court had sustained the appellant's objection: "**He (Mr. Miller) is reputed to be one of the big men in the moonshine business in Cooke County**" (App. 67a). The Court failed and refused to instruct the jury to disregard this testimony.

Mr. Whaley testified: "**I heard of him (Mr. Miller) being implicated in moonshine whiskey**" (App. 72a).

This Court condemned the practice indulged in, in the case at bar, in **Michelson v. United States,** 335 U. S. 469 (1948). Mr. Justice Jackson, delivering the opinion of the Court, stated:

> "Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, Greer v. United States, 245 U. S. 559, 62 L. Ed. 469, 38 S. Ct. 209, **but it simply closes the whole matter of character, disposition and reputation on the prosecution's case in chief.** The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to pre-

vent confusion of issues, unfair surprise and undue prejudice."

Though the Supreme Court has stated that the law **"closes the whole matter of character, disposition and reputation on the prosecution's case in chief,"** the United States Attorney, in the case at bar, was permitted to introduce, by all of the prosecution's witnesses, evidence respecting Mr. Miller's character, save in one instance when the Court sustained the defendant's objection to such testimony. However, in complete disregard of the Court's ruling, the United States Attorney pressed his question, and elicited an incompetent, prejudicial and inflammatory answer (Testimony of Herman O. Bomar, App. 66a-67a).

Mr. Justice Jackson, in condemning the practice engaged in by the United States in the case at bar, further stated:

> "To thus digress from evidence as to the offense to hear a contest as to the standing of the accused, at its best opens a tricky line of inquiry as to a shapeless and elusive subject matter. **At its worst it opens a veritable Pandora's Box of irresponsible gossip, innuendo and smear."**

In the case at bar the witness Whaley based his testimony upon the statement of two or three individuals who visited him while he was Sheriff of Sevier County. **He refused to divulge the names of these persons.** Likewise, the other government witnesses refused to reveal the name of any person who had given them information, upon which they predicated their testimony. Thus it is to be observed that the defendant Miller was required to make his defense to a whispering campaign, conducted by unknown individuals, whose motives were not shown, and whose statements were not subject to cross-examination.

In addition to the ruling of the Supreme Court, in **Michelson v. United States**, supra, we find unanimity in var-

ious holdings, all to the effect that it is prejudicial error, and improper, for the prosecution to introduce evidence of a defendant's character, in its case in chief.

In **Homer Bird v. U. S., 180 U. S. 356, 45 L. Ed. 570, 21 S. Ct. 403,** it was held that testimony offered against an accused on trial for murder, that more than a month before the homicide he threatened violence to another member of the same party, was inadmissible.

In **Hall v. U. S., 150 U. S. 76, 37 L. Ed. 100, 14 S. Ct. 22,** it was held that evidence of other crime of the same kind committed by the defendant, or of his conviction thereof was incompetent.

In **20 Am. Jur., Evidence, Sec. 325,** it is stated:

> "It is generally recognized that the state cannot, in a criminal prosecution, introduce evidence attacking the character of the accused, unless the accused first puts his good character in issue by introducing evidence to sustain his good character or reputation, or has become a witness in his own behalf. Greer v. United States, 245 U. S. 559, 62 L. Ed. 469, 38 S. Ct. 209; Kelly v. People, 229 Ill. 81, 82 N. E. 198, 12 L. R. A. (N. S.) 1169, 11 Ann. Cas. 226; Owens v. Comm., 188 Ky. 498, 222 S. W. 524, citing R. C. L.; Dobbs v. State, 148 Md. 34, 129 A. 275, citing R. C. L.; State v. Williams, 337 Mo. 584, 895, 87 S. W. (2d) 175, 100 A. L. R. 1503; State v. Scott, 332 Mo. 255, 58 S. W. (2d) 275, 90 A. L. R. 860 (overruled on another point in State v. Williams, supra); State v. Beckner, 194 Mo. 281, 91 S. W. 892, 3 L. R. A. (N. S.) 535; People v. Lingley, 207 N. Y. 396, 101 N. E. 170, 46 L. R. A. (N. S.) 342, Ann. Cas. 1913D, 403; People v. Greenwall, 108 N. Y. 296, 15 N. E. 404, 2 Ann. St. Rep. 415; State v. Foster, 130 N. C. 666, 41 S. E. 284, 89 Am. St. Rep. 876; State v. Hull, 18 R. I. 207, 26 A. 191, 20 L. R. A.

609; State v. Remick, 156 Wash. 19, 286 P. 67, citing R. C. L. Annotation: 20 L. R. A. 609, 103 Am. St. Rep. 893.

State v. Hull, 18 R. I. 207, 26 A. 191, 20 L. R. A. 609.

"As a defendant, the character of the accused cannot be attacked by the state; as a witness, he puts his credibility at issue like any other witness. Kirby v. State, 25 Okla. Crim. Rep. 330, 220 P. 74, 33 A. L. R. 1212.

"The character of a person accused of a crime is not a fact in issue in a prosecution for such crime, and the state cannot, in its evidence in chief, for the purpose of inducing belief in the defendant's guilt, introduce evidence tending to show his bad character or that he has a tendency or disposition to commit the crime with which he is charged. Williams v. United States, 168 U. S. 382, 42 L. ed. 509, 18 S. Ct. 92; Fletcher v. State, 49 Ind. 124, 19 Am. Rep. 673; Henson v. State, 62 Md. 231, 50 Am. Rep. 204; State v. Beckner, 194 Mo. 281, 91 S. W. 892, 3 L. R. A. (N. S.) 535; State v. Lapage, 57 N. H. 245, 24 Am. Rep. 69, Bullock v. State, 65 N. J. L. 557, 47 A. 62, 86 Am. St. Rep. 668; People v. Langley, 207 N. Y. 396, 101 N. E. 170, 46 L. R. A. (N. S.) 342, Ann. Cas. 1913D, 403; People v. Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851; Kirby v. State, 25 Okla. Crim. Rep. 330, 220 P. 74, §§ A. L. R. 1912; State v. Hull, 18 R. I. 207, 26 A. 191, 20 L. R. A. 609; Linceeum v. State, 29 Tex. App. 328, 15 S. W. 818, 25 Am. St. Rep. 727.

Annotation: 20 L. R. A. 609; State v. Brady, 100 Iowa 191, 69 N. W. 290, 36 L. R. A. 693, 62 Am. St. Rep. 560; State v. Lapage, 57 N. H. 245, 24 Am. Rep. 69; People v. Sharp, 107

N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851; Annotation: 105 Am. St. Rep. 966."

. . . . . .

"An error committed in admitting evidence on behalf of the state as to the bad character of the defendant is not cured by his submission of evidence in rebuttal thereof. State v. Beckner, 194 Mo. 281, 91 S. W. 892, 3 L. R. A. (N. S.) 535."

To the same effect see **U. S. v. Modern Reed & Rattan Co., Inc., et al., 159 Fed. (2d) 656 (Circuit Court of Appeals, Second Circuit, Jan. 8, 1947); Salt Lake City v. Smith et al., 104 Fed. Rep. 457 (Cir. Court of Appeals, 8th Cir., Oct. 15, 1900);** and **Wigmore on Evidence, 3rd Ed., 1955 Supp. Sec. 18.**

With no proof of Mr. Miller's guilt, other than his ownership of the farm, the government's case in chief was bolstered by incompetent and inadmissible testimony that Mr. Miller was **"one of the big men in the moonshine business in Cocke County"** (Bomar, App. 67a), and similar prejudicial statements. For this error the petitioner assuredly should be granted a new trial.

The Court Erred in Permitting the Government to Introduce Evidence Respecting Mr. Miller's Character When the Witnesses Were Not Qualified to Testify Respecting This.

The witness, Roy Whaley, was permitted to testify respecting the reputation of Mr. Miller. **"I heard of him being implicated in moonshine whiskey"** (App. 72a). This testimony was predicated upon Mr. Whaley's statement that ". . . just one time some people talked to me about it . . . there was two or three of them" (App. 72a).

Mr. Bomar was permitted to testify that the defendant Miller was ". . . **reputed to be one of the big men in the**

moonshine business in Cocke County" (App. 67a). This testimony was introduced after the Court sustained Mr. Miller's objection to the question which elicited such answer (App. 66a).

Mr. Griffin was permitted to testify that Mr. Miller was by reputation, ". . . a dealer in moonshine whiskey" (App. 59a). This testimony respecting reputation was predicated upon information from "informers" given to the witness (App. 59a).

Not alone did the Court err in permitting the United States to offer testimony respecting Mr. Miller's reputation, in its case in chief, but the Court erred in permitting witnesses to testify respecting Mr. Miller's character, who failed to qualify as character witnesses.

In **Michelson v. United States,** supra, the Court stated:

> "Another paradox in this branch of the law of evidence is that the delicate and responsible task of compacting reputation hearsay into the 'brief phrase of a verdict' is one of the few instances in which conclusions are accepted from a witness on a subject in which he is not an expert. **However, the witness must qualify to give an opinion by showing such acquaintance with the defendant, the community in which he has lived and the circles in which he has moved, as to speak with authority of the terms in which generally he is regarded."**

In **Williams v. U. S., 168 U. S. 509,** Williams was indicted for the offense of accepting a bribe. The Court, in this case, stated:

> "Another assignment of error relates to the admission, against the objection of the defendant, of certain evidence as to character. A witness called by the prosecution was permitted to testify that the defendant's reputation 'in the custom house' was bad, al-

though he had distinctly stated, upon preliminary examination, that he did not know the general reputation of the accused 'outside of the custom house.' This was error. Assuming (although the record is silent on the subject) that the accused introduced evidence of his general reputation for integrity, it is clear that evidence, on behalf of the prosecution, that among the limited number of people employed in a particular public building his character was bad, was inadmissible. The prosecution should have been restricted to such proof touching the character of the accused as indicated his general reputation in the community in which he resided, as distinguished from his reputation among a few persons in a particular building. The estimate placed upon his character by the community generally could not be shown by proof only as to the estimate placed upon him by persons in the custom house."

The witness Whaley was permitted to testify as to the character of Mr. Miller, based upon a statement made to him by two or three individuals, during an occasion when he was Sheriff of Sevier County.

Neither of the witnesses, Griffin, nor Bomar, qualified as having knowledge of the reputation and character of Mr. Miller. Therefore, the Court erred in admitting the testimony thus offered.

In addition to the foregoing, the District Attorney did not limit the scope of his examination to the general reputation and character of Mr. Miller, in the community in which he lives, but directed his examination to the alleged general reputation and character of Mr. Miller, as a dealer in moonshine whiskey. The Court erroneously permitted evidence to be introduced respecting this.

The District Court Erred in Instructing the Jury Respecting Substantial Doubt.

The District Court instructed the jury respecting "substantial doubt" as follows:

> **"A substantial doubt does not mean an uneasy feeling not based upon the evidence, a feeling that perhaps, although the defendants appear to be guilty, although a case seems to be made out, there may be some mistake about it. Just an objection to finding a man guilty, or a feeling that perhaps there may be some mistake, an uneasy, restless feeling of that sort, is not sufficient to constitute a reasonable doubt"** (111a).

The Court instructed the jury, in part, **that though they had a feeling that perhaps there may be some mistake about it,** this was not sufficient to constitute **"reasonable doubt."** Such an instruction was obviously erroneous, in and for the reason that a juror, feeling there had been a mistake, on the part of the United States, was told that this was of no consequence, and did not create or constitute "a reasonable doubt."

Many trial judges are partial to the instruction given by Chief Justice Shaw, which, although subjected to some criticism, has been approved by many reviewing courts. Chief Justice Shaw's definition is as follows:

> "Reasonable doubt . . . is not mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge . . . The evidence must establish the truth of the fact

to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it." Conn. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

Mr. Miller does not assert that the Trial Court's failure to use the language of Chief Justice Shaw was in and of itself prejudicial error, but does assert that the Court erred in telling the jury that they should not acquit the defendant if there was ". . . **a feeling that perhaps there may be some mistake** . . ." A juror feeling that there was "**some mistake**" could not have that "**moral certainty of the truth of the charge.**" referred to by Chief Justice Shaw. "**Moral certainty,**" and a feeling that perhaps there may be "**some mistake,**" are not consistent with one another, and the use by the Court of the language aforereferred to, violated the rights of Mr. Miller, who was entitled to an acquittal, unless proven guilty beyond a **reasonable doubt.**

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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July 26 1956.

UNITED STATES COURT OF APPEALS,
Sixth Circuit.

ALF MILLER,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 12,781.

ORDER.

(Filed June 6, 1956.)

Before Allen, Martin and Stewart, Circuit Judges.

This appeal from a judgment of conviction and sentence on the verdict of a jury has been duly heard and considered;

And it appearing that there was substantial evidence to support the verdict of the jury finding the defendant guilty of violation of the Internal Revenue Laws of the United States, in relation to spiritous liquors, as charged in the several counts of the indictment;

And it appearing that no reversible error, in the circumstances of the case, was committed by the trial judge in ruling upon the admissibility of reputation evidence; nor was there reversible error in the charge of the court defining substantial doubt, though we think this paragraph of which appellant complains would best have been omitted;

And it appearing, upon review of the record as a whole, that no reversible error was committed by the trial judge affecting the lawful rights of appellant;

The judgment of the district court is affirmed.

/s/ JOHN D. MARTIN,
United States Circuit Judge.